

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

July 31, 1997

Tony Miller
Tony Miller For Secretary of State '98
2410 "K" Street, Suite C
Sacramento, California 95816

Re: Your Request for Advice
Our File No. A-97-309

Dear Mr. Miller:

This letter is a response to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹ Please bear in mind that nothing in this letter should be construed as evaluation of any conduct which may already have taken place. Further, this letter is based on the facts as they have been presented to us. The Commission does not act as the finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. May your 1998 campaign committee pay a vendor from your 1994 campaign with funds of the 1998 campaign committee?
2. May you personally guarantee the payment of the vendor debt?

CONCLUSIONS

1. No. Only the 1994 campaign committee may pay the 1994 vendor. However, this payment may be made from funds raised presently for the 1994 committee or from funds raised presently for the 1998 committee which are then transferred from the 1998 committee to the 1994 committee.
2. Yes. Your guarantee of the 1994 vendor debt becomes a contribution from you. However, the guarantee is not subject to contribution limits.

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

FACTS

A dispute exists with a vendor from your 1994 campaign committee as to liability for an alleged debt associated with that campaign. The 1994 campaign committee was terminated after it was determined that it was unable to pay all of its debts.

The 1998 campaign committee wants to resolve the outstanding dispute by paying the 1994 vendor from funds of the 1998 campaign committee. To this end, your 1998 campaign committee ("Miller 98") and you, individually, have executed an agreement with the vendor whereby Miller 98 agrees to pay a fixed amount to the vendor with interest in monthly installments based on a percentage of monthly gross receipts of Miller 98 ("the Agreement"). Also, pursuant to the Agreement, you guarantee that any amounts not paid by Miller 98 will be paid by you, individually, with interest, within six months of the 1998 General Election. It is not clear whether you will be executing a separate personal guarantee.

You believe this situation raises a political issue for the 1998 campaign and, therefore, is properly paid with funds raised for that campaign.

ANALYSIS

1. Payment of the 1994 Vendor by Miller 98.

Proposition 208, specifically Section 85305(c), provides the authority which allows a candidate to receive contributions to retire debts incurred prior to an election held before January 1, 1997.² These contributions must be collected within the contribution limits of Sections 85301, 85302, 85304 and 85309 and must be applied separately to each prior election for which the debts are being retired. (*Ramirez* Advice Letter, No. A-97-262.) The "blackout" periods do not apply to fund-raising to retire prior debt. (Section 85305(c).)

Mechanically, there exist two options to repay the 1994 vendor. The first option is to reopen the 1994 committee, fund-raise specifically for that committee and repay the vendor from the funds contributed. (See *Wiener* Advice Letter, No. A-96-330.) Contributions to retire the 1994 debt must be specifically earmarked for that purpose. (*Weiner* Advice Letter, *supra*.) The collection of funds specifically for the 1994 committee does not preclude you from collecting from the same contributors for Miller 98.

Option number two is to reopen the 1994 committee and then to take monies received into Miller 98 and transfer those monies to the 1994 committee for payment of the vendor debt. This type of "intra-candidate" transfer is permissible under the Act. (*Gwinn* Advice Letter, No.

² Please bear in mind, however, that campaign funds may **not** be used to pay settlements. (Section 89513.) You have not asked us to determine if the Agreement constitutes a settlement under Section 89513, and therefore, we do not address that issue.

A-96-147.) Under this option, Miller 98 will be considered the source of the transferred funds and will be required to report the transfer as a payment; the transfer must be disclosed by Miller 94 as a miscellaneous increase to cash. (*Id.*) All contribution and expenditure limitations of Proposition 208 apply to this fund-raising.

There is a collateral, but important, issue related to option two. Based on the facts made available to us, it appears that the original obligation owed to the 1994 vendor constituted either a loan or an extension of credit by the vendor to the 1994 committee. Since in the Agreement you avowed the original obligation (but with renegotiated terms), the obligation evidenced in the Agreement maintains the same character as the original one - a loan or an extension of credit.

Under Proposition 208, specifically Section 85307, loans (other than those given by financial institutions in the normal course of business) are considered **contributions** from the maker (the 1994 vendor in this instance); extensions of credit for a period of more than thirty (30) days (other than loans from financial institutions) are subject to all contribution limitations.

Consequently, if the Agreement remains in its present form with Miller 98 being the obligor and the funds contributed to Miller 98 being the means to pay the vendor, then the provisions of Section 85307 (which govern post January 1, 1997, committees, candidates and campaign contributions) would apply. The effect of this application would mean that the vendor has become a contributor over the limitation amounts and Miller 98 has accepted a contribution in excess of the limits.³

2. Your Personal Guarantee of the 1994 Debt.

You, personally, have agreed to guarantee the debt owing to the vendor, the Winslow Group. This agreement is evidenced by the Agreement dated June 5, 1997, executed by the vendor (in its various legal capacities) and you, individually, and in your capacity as the authorized agent for your 1994 and 1998 campaigns.⁴ We assume for purposes of our analysis that the Agreement is a presently enforceable and binding contract. As part of the Agreement, your guarantee is also an enforceable and binding obligation to pay the amounts owing to the vendor in the event Miller 98 fails to do so. (See Civ. Code §§ 2787 and 2792; *Cooke v. Mesmer* (1912) 164 Cal. 332, 340.)

Under Section 82015, a "contribution" includes (among other things) a payment or an

³ Even though the Agreement has been executed, we are assuming (based on my telephone calls with you) that latitude exists to amend the Agreement to substitute parties. Accordingly, the comments made in this letter with respect to the effects of the Agreement on Miller 98, the vendor and you are made for purposes of evaluating various options. As stated in the introduction to this letter, this office does not comment on past conduct. Also, please note, that issues pertaining to extension of credit and the other limitations of Section 85307 will be addressed in the near future in a Commission regulation. The ramifications of Section 85307 will be specifically addressed.

⁴ You forwarded a copy of the Agreement to this office, via facsimile transmission, on June 5, 1997.

enforceable promise to make a payment except to the extent that full and adequate consideration is received unless it is clear from the surrounding circumstances that it is not made for political purposes. Your guarantee of the vendor debt is an enforceable promise to make a payment. (*Id.*) You do not appear to have received any consideration from your 1994 campaign committee or Miller 98 in exchange for your agreement to guarantee the payment of the debt, and further, your agreement to guarantee is, in part, politically motivated.⁵ Accordingly, your guarantee of the vendor debt constitutes a "contribution" under Section 82015 by you, individually, to Miller 98⁶ and would become reportable by all parties at the time the guarantee is performed. As you are aware, pursuant to Section 85201, all contributions to a candidate or his or her controlled committee shall be deposited into the campaign bank account including the personal funds of the candidate. As you are also aware, no limits exist for contributions made from personal funds. (See Sections 85301(e), 85306 and 85307(c).)⁷

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel



By: Lisa L. Ditora
Staff Counsel, Legal Division

SGC:LLD:jlw

⁵ While we believe the legal issue presented by your first question (payment of the 1994 vendor) is one of debt retirement, this does not mean the issue does not have political consequences.

⁶ Based on our advice concerning the procedures for making payments to the vendor (see discussion, heading 1, *supra*), you may decide to amend the Agreement with the vendor to reflect that only Miller 94 will be making the payments. Should this event occur, your guarantee would constitute a contribution to Miller 94 reportable at the time the guarantee is performed.

⁷ Please note, however, that should the Agreement remain unchanged and should you be called upon to perform under your guarantee, the amounts you pay to the vendor may be considered a loan made to Miller 98 in the event you seek reimbursement (as you are aware, under California law, guarantors have subrogation rights against the primary obligor. (Civ. Code § 2848.)). Under Section 85307(c), you may only have an outstanding loan balance to Miller 98 of \$20,000 at any one point in time.